

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of LINDA J. MITCHELL and U.S. POSTAL SERVICE,  
BICENTENNIAL STATION, Los Angeles, CA

*Docket No. 01-1617; Submitted on the Record;  
Issued February 8, 2002*

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DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

The issue is whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further consideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a) constituted an abuse of discretion.

This case has been before the Board previously. By decision dated February 2, 1999, the Board found that appellant failed to establish that her recurrence of disability was causally related to a June 1, 1992 employment injury.<sup>1</sup> The law and facts as set forth in the previous Board decision and order are incorporated herein by reference.

Subsequent to the Board's February 2, 1999 decision, on January 31, 2000 appellant requested reconsideration and submitted additional medical evidence. In a decision dated February 15, 2000, the Office denied modification of the prior decisions on the grounds that appellant failed to submit rationalized medical evidence explaining that her current condition was causally related to the June 1, 1992 employment injury. On January 5, 2001 appellant again requested reconsideration and submitted additional medical evidence. By decision dated April 3, 2001, the Office denied appellant's reconsideration request, finding the evidence submitted repetitious. The instant appeal follows.

The Board has duly reviewed the case record in the present appeal and finds that the Office did not abuse its discretion in denying appellant's request for review.

The only decision before the Board in this appeal is the decision dated April 3, 2001 in which the Office denied appellant's application for review. Since more than one year had elapsed between the date of the Office's most recent merit decision dated February 15, 2000 and

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<sup>1</sup> Docket No. 97-1354.

the filing of appellant's appeal on May 25, 2001, the Board lacks jurisdiction to review the merits of appellant's claim.<sup>2</sup>

Section 10.608(a) of the Code of Federal Regulations provides that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).<sup>3</sup> This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; or (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.<sup>4</sup> Section 10.608(b) provides that when a request for reconsideration is timely but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review on the merits.<sup>5</sup>

In denying appellant's January 5, 2001 request for reconsideration, the Office found the evidence submitted repetitious. With her request for reconsideration, appellant submitted a November 15, 2000 report in which Dr. Ronald M. Rothman, a Board-certified physiatrist, noted that he began treating appellant in 1994 and concluded:

“[Appellant's] condition, her chronic low back pain as well as her myofascial pain, did seem to begin after her accident in 1992 and was chronic up until she had an exacerbation of her problem in 1994 when I saw her. Since I have been seeing her, she has shown some improvement at times but her condition remains chronic and that is why I would classify her low back pain as well as myofascial pain as permanent and stationary.”

The Board notes that Dr. Rothman had submitted numerous reports in the past in which he opined that appellant's chronic back pain was secondary to a bulging disc precipitated by the 1992 accident. The Board therefore finds that Dr. Rothman's November 15, 2000 report is repetitious and thus insufficient to warrant merit review. The Office, therefore, properly denied appellant's request for reconsideration.

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<sup>2</sup> 20 C.F.R. § 501.3(d)(2) requires that an application for review by the Board be filed within one year of the date of the Office's final decision being appealed. Section 501.2 provides that the Board's review of a case shall be limited to the evidence in the case record which was before the Office at the time of its final decision. The Board is unable to consider evidence for the first time on appeal; see *Marlene K. Cline*, 43 ECAB 580 (1992).

<sup>3</sup> 20 C.F.R. § 10.608(a) (1999).

<sup>4</sup> 20 C.F.R. § 10.608(b)(1) and (2) (1999).

<sup>5</sup> 20 C.F.R. § 10.608(b) (1999).

The decision of the Office of Workers' Compensation Programs dated April 3, 2001 is hereby affirmed.

Dated, Washington, DC  
February 8, 2002

Michael J. Walsh  
Chairman

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member